No. 12635

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of an Order of the Civil Aeronautics Board

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BRIEF OF PETITIONER, WESTERN AIR LINES, INC., IN SUPPORT OF PETITION FOR INTERLOCUTORY RELIEF.

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I.

OPENING STATEMENT.

The main issue on review is whether or not the Board erred in rejecting the petition of Western Air Lines, Inc., for an order consolidating seven proceedings pending before the Board.

The immediate issue is whether or not the Board should be enjoined from commencing, continuing and completing the seven proceedings pending determination of the review on its merits.

If this Court decline to issue an order staying the Board from taking further procedural steps in the proceedings. a favorable decision on review may prove to be hollow.

II.
JURISDICTIONAL STATUTES INVOLVED.

The right of review of the order here under scrutiny comes from Section 1006(a) of the Civil Aeronautics Act, which reads:

> "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." [49 U. S. Code 646(a).]

and from Section 10(a) of the Administrative Procedure Act, which reads:

> "*Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." [5 U. S. Code 1009(a).]

The right of this Court to issue a restraining order, in addition to its inherent power to protect its own proc-

esses, comes from Section 1006(d) of the Civil Aeronautics Act, which reads:

> "Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: Provided, That no interlocutory relief may be granted except upon at least five days' notice to the Board." [49 U. S. Code 646(d).]

and from Section 10(d) of the Administrative Procedure Act, which reads:

> "*Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." [5 U. S. Code 1009(d).]

III.
STATEMENT OF THE CASE.

A. Parties.

Western Air Lines, Inc., Petitioner. Western is the oldest American Flag airline, having commenced operations out of Los Angeles on April 17, 1926. It operates under permanent certificates of convenience and necessity from San Diego to Seattle via Los Angeles, San Francisco and Portland and between Los Angeles and Edmonton, Canada, via Las Vegas, Salt Lake City, Pocatello, Great Falls and other intermediate points. In addition, Western serves Ontario, Palm Springs, El Centro and Yuma in connection with an Imperial Valley operation. Western owns 98% of the outstanding shares of Inland Air Lines, Inc., which operates under permanent certificates of public convenience and necessity from Denver to Minneapolis—St. Paul via various intermediate points and between Denver and Great Falls (there linking with Western's main system) via various intermediate points. Western's system involves 3086 route miles and Inland's 1814. Western's executive offices are maintained in Los Angeles.

Civil Aeronautics Board, Respondent. The Civil Aeronautics Act, enacted in 1938, was designed to regulate civil aeronautics in a fashion somewhat comparable to the manner in which the Interstate Commerce Act regulates ground transportation. The Act set up a bipartisan agency designated the Civil Aeronautics Board, consisting of five members. This Board has power over civil aeronautics, including commercial air transportation, somewhat comparable to the power of the Interstate Commerce Commission over ground transportation.

Southwest Airways Company, Intervener. On May 22, 1946, in the *West Coast Case,*[1] the Board granted a temporary certificate to Southwest for a period of three years authorizing experimental feeder air service between Los Angeles and Medford, Oregon, involving 25 stations and approximately 1216 route miles. Southwest commenced operations on December 2, 1946. Although the three-year term expired on November 22, 1949, Southwest's temporary certificate will continue effective under Section 9(b) of the Administrative Procedure Act until final action of the Board in the *Southwest Renewal Case.*

Since May 22, 1946 the Board has authorized a number of important modifications in Southwest's certificate resulting in increasing its competitive stature with the trunklines.

West Coast Airlines, Inc., Intervener. In the *West Coast Case* a temporary three-year feeder certificate was granted to West Coast Airlines, Inc., between Medford, Oregon, and Bellingham, Washington, involving 21 stations with 688 route miles. West Coast commenced operation on December 5, 1946. Its certificate, by its term, was due to expire on November 22, 1949, but continues in effect under Section 9(b) of the Administrative Procedure Act in the same manner as Southwest's. Since it was granted, West Coast's certificate has been modified in similar fashion to that of Southwest's.

Post Office Department. Although not a formal party, the Post Office Department is a highly interested party. The fact that the Board *fixes* the air mail rates does not

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[1]Reported in Vol. 6 at page 961 of C. A. B. Reports. This was the third "set" of experimental feeder airlines certificated on a temporary basis. The first set was certificated on March 28, 1946, in the *Rocky Mountain States Case* (6 C. A. B. 695) and the second set on the same date in the *Florida Case* (6 C. A. B. 765).

diminish the interest of the Post Office in seeing that funds appropriated for postal service are not squandered in the guise of extravagant or needless mail pay. Usually, the Post Office Department is represented by counsel in proceedings before the Board directly concerning or indirectly influencing air mail rates. The obligation of the Postmaster General to pay the air mail rate fixed by the Board is found in Section 406(a) of the Act (49 U. S. Code 486).

B. The Order Under Review.

On May 2, 1950 Western filed a petition (Appendix A) to consolidate in one proceeding for hearing and disposition seven separate proceedings then pending before the Board.

Two of the proceedings involve renewal of the three-year experimental feeder certificates of Southwest and West Coast for an additional five years. One concerns the proposed merger of Southwest and West Coast. Two more involve routes identical to the route that would exist if Southwest and West Coast were permitted to be merged, one of which is on behalf of Western to amend its permanent route between Los Angeles and Seattle to add additional intermediate points and the other is on behalf of Western Air Lines of the Pacific, Inc., which was organized by Western. These five constitute the core of the proceedings which Western sought to have consolidated.

Of the two remaining proceedings, one is the technical application of Western for approval of the acquisition of stock ownership of Western Air Lines of the Pacific, Inc.

The seventh proceeding sought to be consolidated is the *Reopened Additional California-Nevada Service Case.* It

was thought that the public interest would be served by including this in the consolidated proceedings as it concerns the extension of Southwest's temporary feeder route from Los Angeles to Phoenix by way of various intermediate points. Western is an applicant as well as an intervener in the *Reopened Additional California-Nevada Service Case,* and the routes involved in that proceeding are in no sense exclusive of the routes involved in the other five applications of concern here. No violence would be done to law or equity if the *Reopened Additional California-Nevada Case* were not consolidated with the others, although incongruous conclusions might be reached.

(1) Effect of Southwest's Renewal Case Alone.

The *Southwest Renewal Case* was initiated by the Board on April 4, 1949. Standing alone, it involved only a continuation for an additional five years of that which had been in operation for the past three and one-half years. It did not presage a new trunkline carrier directly competitive with Western on its coastal operations from San Diego to Seattle, as Southwest's northern terminal at Medford safely foreclosed that danger.

It would not have been sensible for Western to file an application which would have been mutually exclusive with the renewal of Southwest's temporary certificate. Southwest and West Coast conceded this in their answer to Western's petition to the Board for reconsideration when they noted on page 25:

> "West Coast and Southwest are two separate companies with two separate and distinct operations. Western's applications are mutually exclusive with *neither* of them separately, and it is beyond Western's control to put them together for the purposes of attempting to obtain a mutually exclusive situation." (Emphasis included.)

The *Southwest Renewal Case,* still standing alone, involved a temporary feeder airline of only 1200 miles. It harbored no impending threat of creating a competitive problem which would be detrimental to the public interest and to Western.

(2) Effect of West Coast's Renewal Case Alone.

What has been said of the *Southwest Renewal Case* standing alone can be said to an even greater extent with respect to the *West Coast Renewal Case.* Continuation for an additional five years of a feeder system involving 700 miles with the southern terminal at Medford sounded no warning and gave no indication of the possibility of a violent alteration of the airline route structure in the Pacific Coast area.

Prior to April 10, 1950, when the *Merger Case* was filed, Western could not have filed a mutually exclusive application which would have been consolidated with the two separate *Renewal Cases.*

(3) Effect of the Southwest-West Coast Merger Case.

From January 1 through April 9, 1950 there were a few scattered rumors that Southwest and West Coast were dickering about a merger. Western had been discussing means for acquiring both Southwest and West Coast as a step in furtherance of the public interest, without warning of the pending merger. These discussions on Western's part sealed the reason, had a seal been necessary, for not attempting to file mutually exclusive applications in the two *Renewal Cases.*

On April 10, 1950 Southwest and West Coast filed an application with the Board for approval of a merger agreement between the two companies. This was the first

notice, other than bald rumors, received by Western that a merger between Southwest and West Coast was pending. Later it developed that negotiations were initiated as far back as July 14, 1949 and that some type of a written agreement concerning the merger was entered into as early as November 6, 1949. Concerning this most important subject, Member Harold A. Jones, in his affirmative statement on Western's petition for reconsideration of the order denying the consolidation, concurred in by Member Russell B. Adams (Appendix D), had this to say:

> "United also called to the attention of the Board the conduct of counsel for Southwest at the same hearing, which conduct, to put it euphemistically, was evasive and misleading, and, from the record, an apparent effort to conceal that a merger agreement between Southwest and West Coast did in fact exist."

The application to merge the two companies created an entirely different climate to the two *Renewal Cases,* as effectiveness of the merger agreement was conditioned on both certificates being renewed for an additional five years. The moment the Merger Application was filed an *entirely new* route proceeding came into being. Where once there were two separate, unrelated applications—one to renew a 1200-mile temporary feeder route of one company terminating in the north at Medford, and the other to renew a 700-mile temporary feeder route of another company terminating at Medford on the south—there was now presented by the Merger Application, in effect and in fact, an application for a 2000-mile, single-company, regional system extending from Los Angeles to Seattle and beyond to Bellingham, totalling more than two-thirds of Western's route structure.

It was here for the first time that the real danger to Western's interests, and above and beyond all else to the public interest, came into sharp and direct focus. Overnight Western became threatened with a new, one-company, regional trunkline carrier that would be cloaked with great competitive advantages becaues of its 45 stations between Los Angeles and Seattle as against Western's 5. On May 2, 1950 Western's applications were filed.

On June 1, 1950 the Post Office Department presented a letter (Appendix B) to the Board recommending that favorable consideration be given to the granting of Western's petition to consolidate.

On June 6, 1950 the Board issued its order, Serial No. E-4292 (Appendix C), denying Western's petition to consolidate. This order was adopted by the votes of Chairman Joseph J. O'Connell, who resigned on July 10, 1950, and Members Josh Lee and Russell B. Adams, with Vice-Chairman Oswald Ryan and Member Harold A. Jones not present and not voting.

It is significant that the Board in this order recited that the two *Renewal Cases* and the *Merger Case* "are in certain respects interrelated to such an extent that it may prove advantageous and consistent with orderly procedure for the Board to decide the three cases simultaneously."

It is equally significant that the order recited "That in view of matters, such as the *new*[2] one-carrier, one-plane *service* that might be possible between points on the routes of Southwest and West Coast should the afore-

[2]Emphasis in quoted material added throughout unless otherwise noted.

mentioned merger proposal be approved," *Southwest's Renewal Case* should be reopened and *West Coast's Renewal Case* reconvened for the purpose of receiving evidence with respect to the effect of the merger upon the suspension of some of United's points, adding that "any delay in the disposition of the renewal proceedings that may result from the action herein taken will not prejudice said carriers;".

The Board found that consolidation of the *Reopened Additional California-Nevada Service Case* would unduly expand the *scope* of the issues and that consolidation of Western's applications would unduly expand the issues (but not the scope) and "unduly delay the disposition thereof." It will be noted that the Board, by its language, cenceded that Western's applications were *within the scope* of the issues created by the *Merger Case* to the extent and as that case revived and completely recolored the two *Renewal Cases*.

On June 26, 1950 Western filed with the Board a 31-page petition for reconsideration of the order denying consolidation. On June 26, 1950 this petition was denied for want of a majority, with two members, Oswald Ryan and Josh Lee opposing the petition and two members, Harold A. Jones and Russell B. Adams favoring it. A copy of the statement of Members Ryan and Lee opposing the consolidation, the statement of Members Jones and Adams favoring the consolidation and the order denying the petition for reconsideration for want of a majority are annexed to this brief as Appendix D.

It will be noted that in the negative statement of Members Ryan and Lee no consideration whatever is given to the public interest. On page 5 this statement is found:

> "It [Western] further contends that the public interest requires consideration of the Pacific Coast air transportation problem as a whole and of possible savings to the Government that it claims would follow if its applications were granted. None of these arguments meets the objections resulting from Western's long delay in filing its applications."

And again on page 7:

> "Whatever the merits of Western's actions or nonaction from its own point of view, it is nevertheless clear that *the carrier made a deliberate choice and must now abide by that choice.*"

And still again on page 8:

> "The mere fact that Western may have been frustrated in its efforts to keep abreast of the merger negotiations between West Coast and Southwest does not mean that Western was thereby rendered powerless to protect its position. If Western feared the possibility of a merged feeder system on the West Coast, and wished to combat it by a proposal for rendering the service itself, Western could and should have filed timely applications to compete with the renewal applications of West Coast and Southwest."

Thus, the two negative members charged Western with dereliction and default. Not a word of explanation is offered by the negative members as to why the *public interest* should be made to suffer by the dereliction of Western—be it ever so true.

Contrasted with this, the two affirmative members noted on page 3 of the affirmative statement:

> "Under these circumstances the Board was called upon to make a determination whether to review these matters, together with the other matters discussed *infra,* in one proceeding in a *logical effort* to, with the broadest possible freedom, attempt to *determine the overall air transport needs of this very important area at one time,* with all the related facts and issues before it. The alternative was to ignore basic and important issues *directly affecting the welfare of the entire West Coast and the air transport system best fitted to serve this area,* and determine the issues on a case-by-case basis in what would amount to a succession of 'keyhole' approachs limited as to issues and scope of possible action."

And on page 6:

> "It seems *particularly indefensible* to refuse to hear the applications of Western for the operation of the West Coast feeder routes before deciding the applications of West Coast and Southwest for certificate renewal and approval of the merger proposal. *This amounts in practical effect to a refusal to hear issues which offer the prospect of saving the the taxpayer at least $750,000 annually, even though it would involve no disruption of present service or substantial prejudice to any carrier.* If the Southwest and West Coast certificates are renewed, and their proposed merger is approved, then *it is perfectly obvious that Western's proposal will, as a practical matter, have been foreclosed.* In addition to the *important public interest elements involved,* such a procedure poses serious legal questions which should be carefully considered rather than disposed of in so cavalier a manner."

Thus, the two negative members denied the consolidation because of *Western's* alleged default, whereas the *affirmative members would have approved it because the public interest would be benefited.*

It will be noted that Member Adams concurred in the original June 6, 1950 order of denial. Evidently he was convinced of his error by Member Jones. Had Chairman O'Connell not resigned prior to July 26 he too might have switched over with Mr. Adams, in which event this review would not have been necessary.

Thus a picture is presented under which, through circumstances of sheer chance, important rights of Western and compelling rights of the public will be trammeled and lost unless this Court intercedes to break the deadlock among four highly placed public officials. And this deadlock despite the fact that another important governmental agency which signs the checks, the Post Office Department, favors the consolidation.

C. Western Has Not Been Guilty of Laches and Is Not Chargeable With Dilatory Tactics.

(1) Western Acted With Promptness When Action Was in Order.

It has been explained why Western did not file paralleling applications for consolidation with the *Southwest Renewal* and the *West Coast Renewal Cases* separately.

When the Merger Application was filed on April 10, 1950 Western moved with speed. Within less than three weeks Western held a meeting of its directors, who approved the program, organized Western Air Lines of the Pacific, Inc., as a new California corporation, prepared an application on behalf of Western Air Lines of the

Pacific, Inc. for a route from Los Angeles to Seattle and on to Bellingham, with the same stops that would be on the route of the Southwest-West Coast merged company, prepared an application to amend its own coastal route to conform precisely with the route that the merged company would have between Los Angeles and Seattle, prepared the technical application for permission to acquire stock ownership of Western Air Lines of the Pacific, Inc., and prepared the petition to consolidate these two mutually exclusive applications with the Southwest-West Coast Merger Application and the two Renewal Applications, both of which were tied to and, to all intents and purposes, became an integral and essential part of the Merger Application.

It may be pertinent here to speculate on why Southwest and West Coast lingered so long before filing the Merger Application. The two affirmative members of the Board, in their statement, said this:

> "As stated before, West Coast and Southwest apparently sought to *conceal* the proposed merger from the Board *until after the prospective renewal cases had been decided,* and it was only brought to the Board's attention as a result of a threat of subpoena."

Renewal of Southwest's 1200-mile experimental feeder system for an additional five years presented only innocuous prospects as far as it concerned Western's rights and the public's rights. The same innocent prospects were reflected by the projected extension of West Coast's temporary feeder certificate. The fact that Western took only passive interest in these two proceedings, standing separately and alone, is ample and adequate evidence in support of this statement.

Western sprang into action the moment it was advised on April 10, 1950 by the Merger Application that action was in order. Western's promptness and Western's efforts to avoid dilatoriness are evidenced by this review. Western first learned on August 4, 1950 that its petition for reconsideration had been denied (although the Board had denied it for want of a majority on July 26, 1950). On the same day, it prepared the petition to review before this Court and obtained an order to show cause, copies of which were served on the Board in Washington the next day. In appraising Western's actions, comparison might be made of the actions of Southwest and West Coast in waiting until April 10, 1950 before filing their joint application for approval of the merger.

(2) Western's Intentions With Respect to Future Procedural Steps.

During the oral argument before this Court on August 14 Mr. Henry, when speaking for Southwest and West Coast, charged that Western was trying to "kill" the merger. This carried the connotation that Western's two route applications, its petition to consolidate and its petition for a review before this Court were merely steps in a delaying program.

If the Board will order a consolidation of the seven (or six, excluding the *Cal-Nevada Case*) cases, either under the mandate of this Court or by its own initiative, Western commits itself:

1. To prepare for the hearing on ten days' notice;

2. To present its direct affirmative case on its own applications in not to exceed two days (including cross-examination, over which Western would have no control);

3. To prepare and file its brief to the Examiner within seven days after completion of the consolidated hearing, and

4. To waive a brief to the Board and consent to oral argument as early as seven days after service of the Examiner's Report.

During the argument Mr. Goldman expressed the view that, if the proceedings were consolidated as requested by Western, the final decision would be two years away. If Southwest and West Coast will meet the time schedule to which Western will commit itself, the consolidated hearing could be concluded well before the end of this year.

By way of additional answer to Mr. Goldman's fear of a two-year delay, it should be noted that in a consolidated hearing there would be one brief, one Examiner's Report and one oral argument. This would take less time than would be required to conduct separate hearings, to prepare separate sets of briefs and to participate in separate oral argument before the Board in each of the several cases.

Should there be a delay of two years under a consolidated hearing, as predicted by counsel, it will have to be charged to the Board's lack of control over its own procedural mechanism and not to Western.

IV.

SUMMARY OF WESTERN'S POSITION AND ARGUMENT.

The basic factors behind Western's complaint against the Board's order denying consolidation is that the *public interest* was ignored. The fact that Western as a corporate entity may suffer irremedial damage in consequence of the Board's action is of minor importance to the public, however important it may be to Western.

By denying a consolidation with the *Merger Case* and the *Renewal Cases,* revised and recolored under light of the *Merger Case,* the public will be denied for five years in all events, and in all probabilities indefinitely, the great saving which Western can accomplish, aggregating in the neighborhood of three-quarters of a million dollars annually.

Even though inclusion of Western's applications along with the *Merger* and *Renewal Cases* might add a dozen or so days, or even a month or two, the rights of the public literally compel that a fair opportunity be given Western to prove that it can benefit the public by such a saving. It would be a travesty on justice and an indictment of our administrative processes if the public were denied the benefits that Western claims it can offer simply to save a few days or a few months.

An even greater denial of justice would result if the interests of the public and the rights of Western were foreclosed because of a two-to-two deadlock. Looking at this under light of the fact that the Post Office Department favors it, the very least that Western and the public are entitled to is a decision on the merits by this Court sitting as an arbiter over the four deadlocked members.

(1) The Public Interest Is Paramount.

Unquestionably, the selfish, "personal" rights of Western and of the would-be merged Southwest-West Coast company are at stake here. But those private interests, however important they may be to the respective corporate entities, must give way to the public interest.

While considering a matter involving the Civil Aeronautics Act, the Second Circuit Court, in *W. R. Grace and Co. v. C. A. B.,* 154 F. 2d 271 (1946), said: "With increasing emphasis the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, *the public interest looms large*" and "The unmistakable fact is that, of recent years, there has been a steady development in Supreme Court decisions of the doctrine that those seeking review of the orders of administrative agencies, under review provisions like §1006 of this Act [Civil Aeronautics Act], 49 U. S. C. A. §646, *are primarily vindicating the public, not a private interest.*"

In similar vein, the Supreme Court in *Scripps-Howard Radio v. F. C. C.,* 316 U. S. 4, 86 L.ed 1229 (1942), said:

> "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to *protect the public interest* in communications. By §402(b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. *But these private litigants have standing only as representatives of the public interest.*" (page 1236.)

Even if it were true that Western made a mistake in judgment in not filing a mutually exclusive application when the *Southwest Renewal Case* was initiated by the Board on April 4, 1949, assuming that Western could

have filed such an application which would have cut-off at Medford, and assuming that Western made a similar mistake in judgment after the *West Coast Renewal Case* was initiated by the Board on June 29, 1949, *the public interest must not be made to suffer by Western's mistake.*[3]

It is thus that Western appeals to this Court to consider the public interest, as the two affirmative Board members did and as the two negative Board members declined to do.

(2) The True Effect of the Merger Application Was to Consolidate the Two Renewal Cases Into a Single New Renewal Case.

Until the Merger Application was filed on April 10, 1950 Western had no warning and no notice that the two separate *Renewal Cases*—one involving 1216 miles with 25 stations and the other involving 688 miles with 21 stations, with a cut-off point at Medford—would emerge into a single, new route case involving 45 stations and almost 2000 route miles extending practically from border to border on the West Coast and paralleling with a single-carrier, single-plane operation the jugular vein of Western's system.

The Board's opinion and order to show cause in the *Southwest Renewal Case,* which started the proceeding, contain not the slightest hint that it might involve a new

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[3]That the public interest may require private parties to submit to delay is emphasized in *Landis v. North American Co.,* 299 U. S. 248, 81 L.ed. 153 (Dec. 7, 1936):

> "We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." (page 159.)

border-to-border route. On the contrary, the Board stated:

> "*This* certificate [Southwest's certificate for route 76] will expire on November 22, 1949, unless renewed by the Board. We have therefore made a careful review of the carrier's operating results, and on the basis of the information presently available to the Board, it is *our tentative conclusion* that a further experimental period of five years is warranted for *that* carrier." (page 10.)

This was tantamount to a notice to Western that the Board was going to renew Southwest's *existing* certificate for another five years unless convincing and compelling reasons to the contrary could be brought forward.

Had the Board's opinion and order to show cause in either *Renewal Case* presented the faintest inkling that "the Board's route program for re-examining the local feeder carrier experiment"[4] contemplated that consideration might be given to unifying Southwest's and West Coast's separate feeder routes into one border-to-border coastal route, or had Southwest and West Coast filed the Merger Application prior to commencement of the hearings on the *Renewal Cases,* as forthrightness compelled, there should be no doubt in any fair mind about the promptness with which Western would have acted. This assertion is proved irrefragably by the speed with which Western acted once the long delayed Merger Application was filed.

In a brittle effort to counteract the all-important and crucial effect of the *Merger Case* on the two separate

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[4]Page 13, Respondent's Memorandum in Support of Answer.

Renewal Cases, the two negative Board members who blocked the consolidation said in their statement:

> "The possibility—or indeed the likelihood—of a proposal for merging the Southwest and West Coast systems has been obvious since the creation of these two carriers and those familiar with the airline industry have long been aware of the possibility of such a development." (page 8.)

The basis of such a statement is clouded in mystery, particularly in face of the Board's own decision creating Southwest and West Coast, in which this was announced:

> "While the west coast area which is here involved is generally considered as an economic unit there are *two distinct trade areas involved;* namely, the Seattle-Portland area serving the northern part of the coast and the San Francisco-Los Angeles area serving the southern part. In establishing local feeder service it is our policy to authorize operations by local companies whose interests are centered in the area in which they will provide service. Establishment of a single local-feeder route extending from Los Angeles to Bellingham such as is here involved would result in the establishment of a line more than 1,000 miles in length serving both of the important trade areas. Although serving many intermediate points it would to a large extent parallel existing trunk-line services. *It appears from the record that insofar as local service is concerned there is a dividing line between the two areas at the Oregon-California boundary line.* North of Medford, which is close to that line, the principal traffic flows are into Seattle and Portland as the trade centers. South of Medford the flow of traffic is to San Francisco and Los Angeles. It is

> significant that in presenting its case West Coast did not propose a connection between the northern and southern parts of its system, and during the course of the oral argument virtually abandoned its application for routes south of Oregon. Southwest was the only carrier suggesting the establishment of a continuous feeder system along the entire west coast area. *It is our conclusion, therefore, that two feeder systems should be set up to provide service over the routes which we have found required by the public convenience and necessity, one of which would extend north of Medford and the other south of that city.* For any traffic which might develop between the areas connecting service will be possible at Medford either with the local carrier or with the trunk-line operator serving that city."[5]

This gave a fair indication, at least to Western, that there was not too much danger of these two relatively small and relatively harmless experimental feeder carriers being merged into a formidable, relatively large and relatively dangerous competitor. When the Board in the two orders to show cause initiating the two *Renewal Cases* gave no warning that such a situation was in prospect, and when the two carriers carefully shrouded in secrecy their negotiations for a merger while the hearings on the separate *Renewal Cases* were going on, Western naively continued to commit the "managerial mistake" of believing that there was no reason to take any affirmative action until April 10, 1950, when the truth came out.

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[5]*West Coast Case,* 6 C. A. B. 961, at page 996.

(3) Consolidation Would Expedite Rather Than Delay Consummation of the Proceedings.

It is perfectly obvious that the Board recognizes the need for tying the two *Renewal Cases* on to the *Merger Case* and completing the three in one decision or in concurrent decisions. The fact that the merger is conditioned on the two separate certificates being renewed alone is sufficient to weld the three together.

It is significant that after Western's petition to consolidate had been denied (but before its petition for reconsideration had been acted upon) the Board set the hearing on the *Merger Case* for August 7, 1950, the reopened hearing on the *Southwest Renewal Case* for August 14, 1950, the reconvened hearing on the *West Coast Renewal Case* for August 16, 1950 and the hearing on the *Reopened Additional California-Nevada Service Case* for August 18, if held in Washington, or August 21, 1950, if held in Los Angeles. This indicates that the four decisions will come down the stretch together.

If the two *Renewal Cases* and the *Merger Case,* either with or without the *Cal.-Nevada Case,* were consolidated with Western's two applications, a single decision on all of the cases almost certainly would come out ahead of separate decisions on the severally tried proceedings.

(4) No Harm Would Result From Any Delay That Might Follow Consolidation.

There has been and can be no showing that the public or any party would be harmed by the consolidation even though some delay would result. Under Section 9(b) of the Administrative Procedure Act the separate certificates of both Southwest and West Coast will continue effective until the Board finally acts—no matter how long the delay.

In the meantime, the traveling public will continue to receive the same service it has received for the past three and one-half years.

If anything, Southwest and West Coast could be benefited by any delay that might result from a consolidation. The assumption is that when the Board does reach a decision in the two *Renewal Cases* it will grant a certificate to each carrier (or the merged one carrier) for five additional years from the date of the decision. Thus, any interim delay will only add to the longevity of the life of the two carriers or the one merged carrier.

The charge that delays in merger cases might hamper voluntary route adjustments is equally untenable. There is not *one* case of a voluntary route adjustment, from merger, acquisition of assets or purchase of a route, which failed of completion because of procedural delays before the Board. Against this there are at least a few cases where the Board originally denied the voluntary agreement between the parties and the same parties later came back with revised agreements or proposals designed to meet the Board's objections.[6]

Against the lack of any real harm to either Southwest or West Coast or to the public if some delay were to attend a consolidation, there is imminent and positive danger of irremedial and permanent harm if the consolidation be denied.

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[6]*Marquette Case*, 3 C. A. B. 111 (1941); *Acquisition of Mayflower*, 4 C. A. B. 680 (June 12, 1944), 6 C. A. B. 139 (Aug. 7, 1944).

The Board, in its Memorandum in Support of its Answer, said with commendable frankness on page 18: "The Board agrees the applications here in question may be treated as mutually exclusive". During the oral argument Mr. Goldman, with equally commendable frankness, stated that if the Board approved the merger and renewed Southwest's and West Coast's certificates, from a practical standpoint, it would not grant either of Western's applications. With this acknowledgment, the subject need not be prolonged. It is worthy of note, however, that there is not a single instance of the Board having allowed competition among the feeders in any place in the United States. This conforms to the rigid policy established by the Board at the outset of the feeder experiment.

Thus, by the Board's own admission, if Western's two applications are not consolidated by the mandate of this Court, both of them will be denied even though a perfunctory "hearing" may be held. The Board will close the door against even listening effectively to Western's claim that it can operate a feeder service between Los Angeles and Seattle at least as good as that which the public has been receiving from Southwest and West Coast as separate carriers, and as good as that which a merged Southwest-West Coast carrier could perform, and at a saving to the taxpayers of $750,000 annually. In five years this would amount to $4,250,000. It is not overstating to say that the public interest literally demands that the Board hear Western's story before the door has been slammed shut.

In its Memorandum (page 11) and during the course of oral argument, the Board has noted that it might decide to deny renewal of the two certificates and that only if and when the Board should decide to renew the certificates and approve the merger will Western be harmed. Manifestly, this is true. But if the Board should come out with a decision renewing the certificates and should approve the merger, the harm will have been done. Thereafter, if this Court comes down with a mandate reversing the Board and ordering the cases to be consolidated, there will be nothing to consolidate. And this Court would not have the power to order the Board to unscramble its decisions and rehear them.

This situation creates an adequate picture of no possible harm flowing from a delay and of the real possibility of irremedial, irreparable and permanent harm if the consolidation be denied.

V.

THE ORDER HERE AT ISSUE IS REVIEWABLE.

The tenor of the briefs filed by the Board and the Interveners is to the effect that Western's petition for review is not meritorious. Although apparently not pressed, the suggestion also is made that the Board's order denying consolidation is procedural only, hence not final and not subject to review. The only treatment given to this point in the Board's brief is in the footnote on page 17, which reads in part: "In addition, there is considerable doubt that petitioner will ultimately prevail in this court because of a substantial question as to the court's jurisdiction to review the merits."

At this point a discussion of the legal right of review of the order as distinguished from its merits is timely. If the order be legally reviewable then the way is open for interlocutory relief upon a proper showing.

Section 285.11(a) of the Board's Rules of Practice provides:

> "Any party may petition for rehearing, reargument, or reconsideration of any *final* order by the Board in a proceeding, or for further hearing before decision by the Board."

The Board accepted and acted upon Western's petition for reconsideration of the order denying consolidation. The petition for reconsideration was denied, not for want of jurisdiction because it was not a final order under Section 285.11(a) of the Rules of Practice, but only because the four members were equally divided.

There are only three court cases concerning the reviewability of an order of the Board denying a petition to con-

solidate. These three cases are controlling precedent that the order here is reviewable.

In *Pacific Overseas v. C. A. B.,* 161 F. 2d 633 (1946), the Board reopened the *Hawaiian Case* for reargument and reconsideration on the existing record. Shortly thereafter Pacific Overseas filed an application for a route from the mainland to Hawaii and petitioned to intervene in and have its application consolidated with the reopened proceeding. This the Board denied and a review was taken to the United States Court of Appeals for the District of Columbia. Without questioning its right to consider the order, the court granted a stay order and remanded the case to the Board.

The next case in order is *Eastern Airlines v. C. A. B.,* 178 F. 2d 726 (Nov. 30, 1949), likewise decided by the United States Court of Appeals for the District of Columbia. Eastern Airlines petitioned to have its application consolidated in the *New England States Case,* which the Board had limited to local or feeder service in the New England area. The court dismissed the petition on the grounds that Eastern's application was not within the *scope* of the *New England Case,* noting, however, "If petitioner had presented an application limited as the applications consolidated in the *New England Case* were limited the Board would have consolidated it for hearing with the others." Here Western's two applications square, point for point, with the merged Renewal Applications of Southwest and West Coast. Moreover, the Board has conceded that the applications involved in the consolidation order may be treated as mutually exclusive. Thus the *Eastern Airlines Case* is direct authority in support of the reviewability of the order here at issue.

The last case, by the same court, is *Seaboard & Western v. C. A. B.,* 181 F. 2d 777 (Dec. 5, 1949). In July, 1947 Seaboard & Western (no relation to Petitioner here) filed an application for a route between the United States and Europe. In December, 1948 Pan American and American Overseas Airlines filed a merger application. At that time there were three certificated American Flag carriers flying between the United States and Europe—Pan American, American Overseas (controlled by American Airlines) and T. W. A. All of the routes had some common points and each had some points not served by either of the others, but generally they were all competitive and they ran side by side rather than end-on as with Southwest and West Coast.

In March, 1949 Seaboard & Western petitioned the Board to consolidate its application with the merger case. This was denied and a petition for review followed. The petition was dismissed but only because the Board had given assurance that the North Atlantic route pattern would not be reconsidered. The court rightly held that in light of this the order denying consolidation was interlocutory and that, therefore, the court had no jurisdiction to review it. In the course of its decision, the court made these statements, which would seem to put an end to any question concerning Western's legal right to have the order here reviewed:

> "Before entering upon consideration of the merits of the controversy, we are met with a contention of the Board that the court is without jurisdiction to review its order denying the consolidation. It says that order is merely procedural and interlocutory and that the jurisdiction of the court is limited to final orders. *But 'final' in this connection does not mean*

a mere last in chronological sequence but means the effectual disposition of rights." (page 779.)

* * * * * * * *

"If the effect of the order denying consolidation in the case at bar were effectually to preclude Seaboard from rights which it otherwise would have, the order would be final as to Seaboard. It follows, as it frequently does in jurisdictional cases, for example, in the WJR case, that we must consider and decide a portion of the controversy on the merits in order to determine whether we do or do not have jurisdiction." (page 779.)

* * * * * * * *

"After the conclusion of an area case, carriers seeking certificates in the area have only such rights as are left open by the decision in that case. At the same time, it seems equally clear that if the Board has under consideration in a pending proceeding the fixing of routes, generally or of a specific nature, in an area and the selection of carriers to operate over those routes, *it must include in the proceeding* all pending applications for certificates over such proposed routes. Otherwise, the statutory right of excluded applicants to hearing and decision upon their applications would be futile." (pages 779-780.)

* * * * * * * *

"As we have said, it has no initial right to have the area case reopened; its right is to have its application considered in any proceeding in which general consideration of the area is reopened." (page 780.)

Significantly, in its order in the *Seaboard Case* (a copy of which is attached as an appendix to the Board's brief here), the court denied Seaboard's motion for a stay "without prejudice to its renewal when, as and if it appears

that the Board intends to invade Seaboard's right in the proceeding". This makes it plain that if the *Pan American-American Overseas Merger Case* had developed into a re-examination of the North Atlantic route or had it involved the merger of two non-competing, end-on routes, as we have here, a stay order would have issued.

Contrary to the case here, the facts in the *Seaboard Case* indicate that Seaboard's position would be bettered rather than worsened by the merger because it would reduce from three to two the number of American Flag carriers operating over the Atlantic and, to that extent increase Seaboard's chances of having its application granted when it came on for hearing in due course.

These cases, read under light of Section 1006 of the Civil Aeronautics Act, should dispel any doubt concerning the reviewability of the order here under scrutiny.

In passing, it is worthy of note that since the Board came into existence twelve years ago only four petitions to review orders denying consolidation have been filed, including the petition here. That strikes down any apprehension the Board might claim to have that its procedural mechanism will be derailed if the courts interfere in consolidation orders.

VI.

UNDER THE LAW THIS REVIEW IS MERITORIOUS.

Both in oral argument on August 14 and in its brief (page 18) the Board has conceded that Western's two applications are mutually exclusive with the two *Renewal Cases.*

On page 20 of its brief the Board denies that Western's applications are mutually exclusive with the Southwest-West Coast Merger Application. This takes too narrow a view of the subject. It is true that in the *Seaboard & Western Case,* to which reference has been made, the court held that the proposed merger of Pan American and American Overseas would not trespass on any rights of Seaboard, but that involved joining side-by-side routes with no renewal involved. But here we are concerned with the consolidation and renewal of end-on routes, which creates an entirely different picture. The Board recognized this large difference in the original denial order of June 6 when it found "that in view of matters such as the *new* one-carrier, one-plane *service* that might be possible between points on the routes of Southwest and West Coast should the aforementioned merger proposal be approved," the *Southwest Renewal Case* should be reopened and the *West Coast Renewal Case* reconvened. An expert mind is not required to know that no comparison exists between two separate and separately operated routes—one from Los Angeles to Medford, the other from Seattle to Medford—and a single through route, under a single operation, from Los Angeles to Seattle.

Apparently Southwest and West Coast recognize this, as the joint application for approval of the proposed merger contains this prayer:

> "4. That an appropriate order be made and entered by the Board authorizing Southwest upon consummation of the proposed merger to engage in air transportation with respect to persons, property, and mail on all routes theretofore certificated to Southwest and West Coast;".

However, after admitting, in effect, the applicability of the *Ashbacker Case*[7] by conceding that Western's applications are mutually exclusive with the two *Renewal Cases,* it is claimed that Western's applications were not filed in time. The inference is cast that a mutually exclusive application to come under the *Ashbacker Case* must be filed before commencement of the hearing on the first application.

The *Ashbacker Case* does not draw a line in administrative procedural processes on one side of which consolidation of mutually exclusive applications is mandatory and on the other side of which it is discretionary. In the *Ashbacker Case* itself, Fetzer filed the first application in March, 1944. In May, 1944 Ashbacker filed its application. On June 27, 1944 the Commission granted Fetzer's application without a hearing, as the Act permitted, and without first hearing Ashbacker's application, which was required under the Act before issuing a denial. Certainly the Fetzer application must have been processed well along to completion by the time Ashbacker's application was filed, as otherwise the granting order hardly could have been released in June.

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[7] *Ashlacker Radio Corp. v. F. C. C.,* 326 U. S. 327, 90 L. ed. 108 (Dec. 3, 1945).

In the *Seaboard & Western Case* the court said that, after the *conclusion* of an area case, carriers seeking certificates in the area have only such rights as are left open by the decision in that case and;

> "At the same time, it seems equally clear that if the Board has *under consideration* in a pending proceeding the fixing of routes, generally or of a specific nature, in an area and the selection of carriers to operate over those routes, it *must* include in the proceeding all pending applications for certificates over such proposed routes." (pages 779-780.)

A proceeding is *pending* until the Board's decision. The *Seabord & Western Case* thus would lend more than faint color to an argument that the *Ashbacker Case* applies right up to the point of the Board's decision.

This hypothesis is not urged. Admittedly, a complete breakdown of an administrative agency's procedural activities could take place if a halt had to be called in a proceeding at *any* time a new mutually exclusive application were placed on file. In theory, to block out a would-be competitor, all an existing carrier would have to do would be to await the eve of the Board's decision, file a mutually exclusive application and cite the *Ashbacker Case*. That, of course, is an absurd extreme and the fact that it has not been done before this Board or any other board, at least so far as the reported cases go, is rather convincing evidence that there is little danger that it will be done.

Here we need not be troubled with the ordeal of attempting to fix a cut-off point. Western takes the position that under the circumstances involved in this particular case, and under the peculiar and special facts, either the Board committed a legal error or it abused its discretion.

It will be argued first that the *Ashbacker Case* is mandatorily applicable here, and second that an arbitrary abuse of discretion commands a reversal.

Indeed, it is doubtful that it would be proper for the courts to attempt to establish a formula designed to determine in any case when the *Ashbacker Case* would be mandatory and when only discretionary. In *F. C. C. v. Station WJR,* 337 U. S. 265, 93 L. ed. 1353 (1949), reversible error was claimed on the ground that the Commission had denied the right of oral argument. The court said this:

> "It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures. be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum." (page 1361.)

(1) The Facts Make Application of the Ashbacker Case Mandatory.

Before treating with this point consideration should be given to the question of whether or not the *Ashbacker Case* requires a simultaneous hearing or simply a simultaneous decision. On page 24 of its brief the Board

claims that only a simultaneous decision is required even where the *Ashbacker Case* is mandatory. The *Ashbacker Case* itself does not decide the point, although there might be some dicta which could lead to a conclusion that separate hearings followed by simultaneous decisions would serve the purpose.

The Court of Appeals for the District of Columbia in *Kentucky Broadcasting Corp. v. F. C. C.,* 174 F. 2d 38 (1949), said:

> "We hold that the Commission in this case accorded the parties hereto a full and fair *comparative hearing as required by the opinion of the Supreme Court* in Ashbacker Radio Corp. v. Federal Communications Commission." (page 42.)

The same Court in *Radio Cincinnati v. F. C. C.,* 177 F. 2d 92 (1949), said at page 94: "Since the two applications were mutually exclusive, *this comparative hearing was required by the now-familiar doctrine of the Ashbacker case.*"

Whether mutually exclusive applicants are entitled to a comparative hearing or only comparative and simultaneous decisions need not be decided at this phase of the proceeding here. All will agree that the *Ashbacker Case* is mandatory up to the point of the commencement of the hearing. In effect and in fact, that point has not been reached in the seven cases sought to be consolidated. This is literally true of five of the seven—the *Merger Case,* the *Reopened Additional California-Nevada Service Case* and Western's three applications.

The hearing before the Examiner in the *Southwest Renewal Case,* under its color before the *Merger Case* was filed on April 10, 1950, has gone through the hearing and past the Examiner's Report. There yet remain

briefs to the Board, oral argument and the Board's decision. At this stage it would be very simple to reopen the record (as, in fact, the Board already has done) and consolidate that record into a single record in the consolidated proceeding. This would make it unnecessary to re-do that which already has been done and no time would be lost or wasted.

The *West Coast Renewal Case* has progressed to the point of substantial completion of the hearing. There yet remain receiving such additional evidence as might be pertinent for closing the hearing, briefs to the Examiner, the Examiner's Report, briefs to the Board, oral argument and the Board's decision. It would not even be necessary to reopen this case to include it among the consolidated cases as it has not been closed. What has been done would not have to be re-done. The transcripts of the hearing could be included with the transcript of the consolidated hearing.

Though it might be argued that *standing alone* both the *Southwest Renewal Case* and the *West Coast Renewal Case* have reached a procedural point where the *Ashbacker Case* would not apply to a newly filed, mutually exclusive application, it would be wrong to urge this argument under light of the effect of the *Merger Case*. It has been shown that the *Merger Case* completely and undeniably changed the two *Renewal Cases*. There is no escaping from the conclusion that when the Merger Application was filed on April 10, 1950, obviously under compulsion, the practical and only sensible effect of it was to establish a new, single, all-embracing proceeding, placing at issue (i) the extension not of two separate end-on routes but of one newly consolidated route extending from Los Angeles to Seattle and on to Belling-

ham, and (ii), provided the whole of that route were extended, the approval of the corporate unification of the two owners. *The hearing on that matter has not commenced.*

If the *Ashbacker Case* has any meaning, it must apply under these circumstances. Western urges that, under the unusual circumstances with which this review is cloaked, the *Ashbacker Case* is squarely and directly in point.

(2) Even Though the Ashbacker Case Were Not Mandatory, a Reversible Abuse of Discretion Was Committed by the Two Negative Board Members.

On page 18 of its brief the Board states, "The Board's action in refusing to consolidate petitioner's applications was clearly proper." Again on page 24, "Surely a procedural matter of this character is one for the Board to determine, unless there can be a clear showing of legal injury to one of the parties. And no semblance of such showing can be made here." Still again on page 26, "The reluctance of the Board to order a consolidated hearing of the cases in question is readily understood when it is realized how far some of the proceedings had already gone before petitioner sought consolidation." It is somewhat difficult to understand how the author of the brief was able to use such words as "clearly proper," "clear showing," "no semblance" and "reluctance of the Board" when *two* of the *four* members in strong language wanted to grant the consolidation.

The Act provides that Western is entitled to a hearing on its application (Section 40(c), 49 U. S. Code 481(c)). The cases hold that this hearing must be fair.

In *Ohio Bell Teleph. Co. v. Public Utilities Com.*, 301 U. S. 292, 81 L. ed. 1093 (Apr. 26, 1937), this was said:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings there informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. [cases] Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. *All the more inisistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard'* [case] *of a fair and open hearing be maintained in its integrity.* [cases] *The right to such a hearing is one of 'the rudiments of fair play'* [cases] assured to every litigant by the Fourteenth Amendment as a minimal requirement. [cases] *There can be no compromise on the footing of convenience of expediency, or because of a natural desire to be rid of harassing delay,* when that minimal requirement has been neglected or ignored." (pages 1101-2.)

The courts reference to "a natural desire to be rid of harassing delay" should be given thoughtful attention. Claimed, but far from proved, delay which would result from the requested consolidation is the *only* argument advanced in justification of the acts of the two negative Board members who, by creating a deadlock, denied to Western the rudiments of fair play.

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L.ed. 431 (Jan. 20, 1913), the Supreme Court said "that administrative orders, quasi

judicial in character, are void if a hearing was denied; if that granted was inadequate *or manifestly unfair*;".[8]

Inasmuch as final denial of the petition to consolidate resulted from a deadlock among the four Board members, it might be argued that the error resulted from an unusual and unfortunate chance circumstance rather than from an abuse of discretion. But, in fact, the negative view of the two negative members amounts to an abuse of discretion and should be set aside by this Court. Any ruling which denies the rudiments of fair play to a hearing and rejects the spirit and intent of the statute involved is infected with an abuse of discretion.

In *Fox Film Corp. v. Trumbull,* 7 F. 2d 715 (Aug. 17, 1925), the District Court for Connecticut had this to say about discretion:

> "The use of the words 'within the discretion of the commission' does not import absolute and capricious discretion. It is an administrative discretion, and it requires him to satisfy himself that such a state of facts exists that under the statute a reel is of 'strictly scientific character' or is 'for the promotion of educational, charitable, religious, and patriotic purposes and for the instruction of employees by employers of labor.' In deciding that question, he necessarily exercises discretion and judgment. It can be decided in no other way. *And in doing so he does not have unlimited license to act, irrespective of restraint. He must act in conformity with the intent and provisions of the statute."* (page 727.)

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[8]Other cases containing equally forceful language are *St. Joseph Stock Yards Co. v. U. S.,* 298 U. S. 38, 80 L.ed. 1033 (Apr. 27, 1936); *Morgan v. U. S.,* 304 U. S. 1, 82 L.ed. 1129 (Apr. 25, 1938); *C. A. B. v. State Airlines,* 94 L.ed. 346 (Advanced Opinions, Feb. 6, 1950), and *Jones v. S. E. C.,* 298 U. S. 1, 80 L.ed. 1015 (Apr. 6, 1936).

In *Markall v. Bowles,* 59 F. Supp. 463, N. D. Cal., S. D. (Sept. 5, 1944), the Court said:

> "So here the discretion vested in the Board must be exercised in the light of the *purposes of the statute* and the regulations promulgated pursuant thereto." (page 465.)
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> * * * * * * * *
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> "When 'discretion' is abused, discretion becomes arbitrary. Decision then rests alone upon one's will and not upon a process of reasoning nor upon considered judgment. United States v. Lotempio, D. C., 58 F. 2d 358, 360. Otherwise stated, it means acting according to one's own will or pleasure, capriciously and without adequate determining principles." (page 465.)

The spirit and intent of the Civil Aeronautics Act is found in Section 2, captioned "Declaration of Policy."[9]

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[9]"Sec. 2 [49 U. S. Code 402]. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

"The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices" will not be accomplished if two members of the Board have the discretionary power to deny not simply a *fair* hearing, but, in fact, *any* hearing, to an applicant that states it can save the Government $750,000 a year.

Although the Civil Aeronautics Board may consist of experts in the field of civil aeronautics, no court should hesitate to issue proper directives when the circumstances warrant. Warrant most certainly is found when the injury comes not from the reasoned decision of a majority but only from a negative approach under a deadlock. And it must not be forgotten that the Post Office Department favored the consolidation.

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in *the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings* which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System v. U. S.,* 316 U. S. 407, 86 L.ed. 1563 (June 1, 1942) at page 1575.
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> "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, *the seal of a United States Court should not become a mere rubber stamp for the approval of*

arbitrary action by an administrative agency. Why, in the context, should any power of review whatever have been vested in the courts, unless Congress intended that such review should be judicially exercised?" *General Tobacco & Grocery Co. v. Fleming,* 125 F. 2d 596 (Feb. 5, 1942) at page 599.

Even though a majority of the Board finally had ruled against consolidation, the facts in this case would have made it a clear and arbitrary abuse of discretion.

It is not too important whether the *Ashbacker Case* should have been applied mandatorily or discretionarily. Error was committed by the Board. This reveals adequate merit to Western's petition for review and requires that full consideration be given to the request for a stay order.

VII.

A STAY ORDER IS IMPERATIVE.

On page 10 of its brief the Board argues in effect that Western cannot be harmed unless and until the Board issues its decisions renewing the certificates of Southwest and West Coast and approving the merger, and that none of the administrative steps (presumably the hearings, briefs, Examiner's Report and oral argument to the Board) in any way could endanger Western. In addition, it is noted, but accepted in vain hope by Western, that the Board might in fact decide against the renewals or the merger.

The argument continues (page 11), "At that time [after the Board's decisions] the petitioner could request a stay, and if the Court were of the opinion that such relief was necessary, the Court could *then* stay the effectiveness of the Board's decision until judicial review of the Board's order denying consolidation had been completed." The fallacy of this argument is that once the Board has reached its decisions there would be nothing to consolidate with Western's applications. Even though armed with a mandate of this Court, Western at that time would be in the position of having a right without a remedy.[10] The mandate of this Court directing the Board to consolidate the four pending proceedings (which then would not be pending) with Western's three pending proceedings would

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[10]A somewhat comparable situation is found in *Bardwell v. Turner,* 219 Cal. 228 (Oct. 20, 1933). Defendants appealed to the California Supreme Court from an order of the Superior Court denying their motion for a change of venue from Kern County to Los Angeles County and applied for a writ of *supersedeas* pending the appeal, which was granted by the Supreme Court. Defendants could have been harmed only if the lower court went to trial in Kern County, decided against defendants, and the Supreme Court thereafter reversed the order denying the change of venue.

be meaningless. That mandate could not serve to reverse the Board's decisions or serve to compel the Board to reopen those decisions.

Western as an intervener in those cases could petition the court for a review of the decisions. However, lacking a comparative record or comparative decisions from which the reviewing court could determine whether the Board had erred in granting the combined Southwest-West Coast applications against Western's application, the court review of the decisions would be empty.

Issuance of a stay order against an administrative agency pending a review of its order is by no means unusual.

> "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. *But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.* It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, *a federal court can stay the enforcement of a judgment pending the outcome of an appeal.* [cases] (page 1234.)
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> * * * * * * * *
>
> *"If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made."* (page 1234.)
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> *Scripps-Howard Radio v. F. C. C.*, 316 U. S. 4, 86 L.ed. 1229 (Apr. 6, 1942).

Merchants Warehouse Co. v. U. S., 283 U. S. 501, 75 L.ed. 1227 (May 18, 1931), involving an order of the Interstate Commerce Commission canceling certain tariffs in which a stay order was issued, presents an interesting slant to the case here since the court noted that the legality of the matter in dispute was not free from doubt, as the judges of the court below were not unanimous:

> "*The court below was within the limits of its discretionary power in staying the Commission's order pending the appeal.* The practice complained of was of long standing, entered into, so far as appears, in good faith, at a time when the discrimination, if it existed, was much less serious than at present, and before the present prohibitions against such discriminations. *Its legality now is not free from doubt, as is indicated by the fact that the judges of the court below were not* UNANIMOUS. The immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbance of a course of business affecting not alone the parties to this litigation, but the patrons of the various warehouses, which the court below found would be irreparable. *These considerations, taken together, were sufficient to call for the exercise of its discretion.*" (pages 1238-9.)

If lack of a unanimous decision is a factor justifying a stay order pending a review, a *deadlocked* "decision" should be close to a compelling reason for issuing a stay order.

Although under a different statute, and thus not directly in point, the case of *Lambros v. Young,* 145 F. 2d 341 (Oct. 30, 1944), decided by the Court of Appeals, Dis-

trict of Columbia, is pertinent as it involved a deadlocked, one-to-one decision of the Commissioners of the District of Columbia on appeal from a ruling of the Alcoholic Beverage Control Board revoking a liquor license:

> "Even if the judicial rule [affirmance of lower court when appellate court evenly divided] could be applied by analogy we should be slow to read rigid judicial precedents into an administrative statute. One of the purposes of administrative law is to permit a more elastic and informal procedure than is possible before our more formal courts. The result for which the Commissioners argue here is inelastic and seems to us *unfair. It deprives appellants of their license in a case where the Commissioners have been unable to reach a conclusion* whether they are guilty or innocent of the criminal charges which justify revocation of their right to carry on their business." (page 343.)
>
> * * * * * * * *
>
> "It follows that an injunction should issue against the enforcement of the order revoking appellants' license which will terminate when the appeal is reinstated." (page 343.)

The complete lack of any danger of real harm to the public or to Southwest or to West Coast from the effects of a stay order, and the real possibility that Western's right to a fair hearing on its applications may be completely and forever lost in the absence of a stay order present circumstances compellingly in favor of a stay order pending the review on its merits. This will give assurance that the processes of this Court will not be futile and that an irretrievable injustice will not be committed.

CONCLUSION.

Denial of consolidation of Western's applications with the *Southwest-West Coast Cases* was equivalent to denying a fair hearing to Western. This is intolerable to the law.

Failure to enjoin the Board from going forward to conclusion with the *Southwest-West Coast Cases* could put to naught the mandate of this Court if the Board were reversed on the merits of the review. The right to an effective Court review and enjoyment of the fruits of a favorable Court decision should not be under indirect but effective control of the administrative agency whose order is under review.

An appropriate stay order should be issued by this Court.

Respectfully submitted,

HUGH W. DARLING,
GEORGE G. GUTE,
Attorneys for Petitioner.

GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

August 19, 1950.

Certificate of Service.

I certify that on this date I will have caused to be served by mail, properly addressed, with postage prepaid, copies of the foregoing Brief upon the attorneys of record for Respondent and for Interveners.

Los Angeles, California, August 19, 1950.

GEORGE G. GUTE,
Attorney for Western Air Lines, Inc.

APPENDIX A.

Before the Civil Aeronautics Board.

In the Matter of the Petition of Western Air Lines, Inc. Under Title X of the Civil Aeronautics Act of 1938, as Amended, and Part 285 of the Rules of Practice for an order of consolidation.

Petition of Western Air Lines, Inc., for an Order of Consolidation.

Western Air Lines, Inc. respectfully petitions for an order of this Board consolidating in one proceeding for hearing and disposition the following proceedings:

1. Docket No. 3718—Concerning the renewal of the certificate for Route 76 held by Southwest Airways Company and the suspension in part of the certificate for Route 1 held by United Air Lines, Inc.
2. Docket No. 3966—Concerning the renewal of the certificate for Route 77 held by West Coast Airlines, Inc. and the suspension in part of certificates for Routes 1 and 57 held by United Air Lines, Inc.
3. Docket No. 4405—Concerning the proposed merger of West Coast Airlines, Inc. into Southwest Airways Company.
4. Docket No. 2019 *et al.*—Concerning the matters, applications and orders to show cause pending for hearing and determination in the Additional California-Nevada Service Case.
5. Docket No. 4447—Concerning the application of Western Air Lines, Inc. for additional intermediate points in the states of California, Oregon and Washington on its Route 63.

6. Docket No. 4448—Concerning the application of Western Air Lines of the Pacific, Inc. for a certificate of public convenience and necessity for a route between Los Angeles, California and Bellingham, Washington by way of various intermediate points.
7. Docket No. 4449—Concerning the application of Western Air Lines, Inc. for approval of the acquisition of complete stock ownership of Western Air Lines of the Pacific, Inc.
8. Any other matters, applications, petitions and orders to show cause pending before the Board which might be affected by or have effect on any of the foregoing matters.

Points and Authorities Relied Upon in Support of This Petition.

I.

Title X of the Act and Part 285 of the Economic Regulations, coupled with recognized precedent, give the Board ample power to consolidate separate and several matters pending before the Board into one proceeding when that course of action appears to be in the public interest and beneficial to the rights of the various parties concerned.

II.

The seven separate proceedings sought to be consolidated in one proceeding are all interrelated. The Board's decision in each will have some pressure on each of the other proceedings.

The interrelationship of Item 1 (the renewal of Southwest's certificate for Route 76), Item 2 (the renewal of

West Coast's certificate for Route 77) and Item 3 (the merger of West Coast into Southwest) is adequately self-evident.

The relationship of Item 4 (concerning the revived portion of the original California-Nevada Service Case) to Items 1, 2 and 3 is equally self-evident. If the Board should refuse to extend Southwest's certificate under Item 1, and thus allow it to expire *sine die,* there would be little use in granting Southwest's applications which have been consolidated into Item 4.

Item 5 (concerning Western's application for additional points on Route 63) and Item 6 (concerning the application of Western Air Lines of the Pacific) were framed especially and specifically for the purpose of enabling the Board to determine on competent evidence whether the public interest might be served better and more economically if a feeder service in the Pacific Coast area where operated either by an established regional trunkline carrier directly or by an established regional trunkline carrier through a wholly-owned subsidiary. If consolidated into one proceeding, the Board will have in front of it, side by side, all evidence, including the cost, relating to the operation of a feeder service in the Pacific Coast area (a) by Southwest and West Coast separately, (b) by Southwest alone under the proposed merger of West Coast, (c) by Western under its own operation and (d) by Western through a wholly-owned subsidiary. The value to the Board, to the taxpayers and to the applicants of the advantages of having such a complete picture in one frame is inestimable.

Item 7 (concerning the acquisition by Western of control of Western Air Lines of the Pacific) necessarily is

welded to Item 6, which in turn is linked to Item 5, which in turn, as has been shown, bears upon Item 4, 3, 2 and 1.

Item 8 (concerning all other matters) has been included in the event other applications, which would be subject material for consolidation, should be filed subsequent to the order of consolidation under this petition and prior to the consolidate hearing.

III.

By combining the seven interrelated proceedings into one proceeding for a single hearing and a single decision, a complete and comprehensive record will be made enabling the Board to place each application in clear focus with each of the other applications. This will tend to give assurance that the over-all public interest will not be submerged in favor of the interests of only one class of the public or in favor of the interests of only a portion of the area involved. In addition, substantial savings in time and effort indubitably will accrue, as a good deal of evidence pertinent to one application would be equally pertinent to many, if not all, of the others, thus avoiding the re-introduction of similar evidence in successive cases separately heard. The time required to hear, brief, argue and decide all of the proceedings in one consolidated proceeding will be considerably less than the time that would be consumed in hearing, briefing, arguing and deciding each case separately. This will redound to the public interest and will foster orderly and expeditious proceedings before the Board.

IV.

Consolidation into one proceeding of the interrelated proceedings will sprout benefits in the form of assurance that the over-all public interest will be kept in proper perspective and in the form of expedition and saving of time and labor, as well as saving in procedural cost. These benefits commend this petition to favorable action by the Board.

In the absence of a clear showing of consequent injury of significance to an interested party, an order of consolidation should be made.

Respectfully submitted,

WESTERN AIR LINES, INC.
By /s/ Terrell C. Drinkwater
Terrell C. Drinkwater
President

VERIFICATION.

State of California, County of Los Angeles—ss:

Terrell C. Drinkwater, being first duly sworn, deposes and says that he is President of Western Air Lines, Inc., the Petitioner in the foregoing document; that he has read and is familiar with the contents thereof; that he intends and desires that in granting or denying the relief requested the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth and that to the best of his information and belief every statement contained in the foregoing document is true and no such statement is misleading.

/s/ Terrell C. Drinkwater
Terrell C. Drinkwater
President

Subscribed and sworn to before me this 27th day of April, 1950.

/s/ Earnest H. Brown
Notary Public in and for the County of Los Angeles, State of California

My Commission expires December 5, 1952.

CERTIFICATE OF SERVICE.

I certify that on this date I will have caused to be served by mail, properly addressed, with postage prepaid, copies of the foregoing Petition upon the attorneys of record for all parties who may be concerned.

Dated: May 2, 1950, Los Angeles, California

/s/ D. P. Renda
D. P. Renda
Assistant Secretary and Attorney

APPENDIX B.

Address Reply To
"THE SOLICITOR"
And Refer To
Initials and Number
JTC:eb

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

June 1, 1950

Civil Aeronautics Board
Department of Commerce Building
Washington 25, D. C.

Re: Docket No. 3019, et al: Reopened portions of the California-Nevada Service Case.

Docket No. 3718: Southwest Extension/United Suspension Case.

Docket No. 3966: West Coast Extension/United Suspension Case.

Docket No. 4405: Southwest/West Coast Merger Case.

Docket No. 4447: Application of Western Air Lines for additional intermediate points on Route No. 63.

Docket No. 4448: Application of Western Air Lines of the Pacific for a certificate of public convenience and necessity.

Docket No. 4449: Application of Western Air Lines for approval of acquisition of control of Western Air Lines of the Pacific.

Gentlemen:

Western Air Lines has filed a Motion for an Order of Consolidation of all of the above-described dockets into one proceeding, and in further support there has been filed a Supplemental Memorandum alleging that combining the operations of Southwest Airways and West Coast Airlines with those of Western Air Lines would result in a potential savings to the Government of approximately $750,000, annually. The Post Office Department is a party in the first three cases listed.

The Department urges that there be a complete rather than a piecemeal examination of the matters involved, and a full examination into potential savings before final decision on renewal of the temporary certificates in issue. It is therefore respectfully recommended that favorable consideration be given to granting of the aforesaid Motion.

Very truly yours,

(Signed) Frank J. Delany

Frank J. Delany
Solicitor

cc: All parties,
Dockets Nos. 3019, 3718, 3966,
4405, 4447, 4448, and 4449.

APPENDIX C.

Orders Serial Number E-4292.

United States of America, Civil Aeronautics Board, Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 6th day of June, 1950.

In the matter of the

Southwest-West Coast Merger Application,
Southwest Renewal-United Suspension Case,
West Coast Renewal-United Suspension Case,
Reopened Additional California-Nevada Service Case,

Western Air Lines, Inc.
Application for additional intermediate points in the states of California, Oregon and Washington on its Route 63,

Western Air Lines of the Pacific, Inc.
Application for a certificate of public convenience and necessity for a route between Los Angeles, California and Bellingham, Washington by way of various intermediate points, and

Western Air Lines, Inc.
Application for approval of the acquisition of complete stock ownership of Western Air Lines of the Pacific, Inc.

Docket Nos. 4405, 3718 *et al.*, 3966 *et al.*, 2019 *et al.*, 4447, 4448, 4449.

ORDER.

United Air Lines, Inc. (United), having filed a motion with the Board on April 27, 1950, requesting, *inter alia*, (a) severance from the *Southwest Renewal-United Sus-*

pension Case, Docket No. 3718 *et al.,* and the *West Coast Renewal-United Suspension Case,* Docket No. 3966 *et al.,* of the issues of renewal of the certificates of public convenience and necessity of Southwest Airways Company (Southwest), and West Coast Airlines, Inc. (West Coast), (b) consolidation of the severed portions of the certificate renewal proceedings with the *Southwest-West Coast Merger Case,* Docket No. 4405, for hearing and decision, (c) deferment of all further procedural steps with respect to the remainder of the aforementioned *Southwest Renewal-United Suspension Case* and *West Coast Renewal-United Suspension Case* and deferment of the *Reopened Additional California-Nevada Service Case,* Docket No. 2019, *et al.,* until after final decision upon the proposed merger and, in the event of approval thereof, until after operating experience has been obtained under the merger;

United having represented in support of its motion, *inter alia,* that the issues of the certificate renewal cases and the merger application are closely interwoven and can be disposed of together expeditiously; that the factual situation underlying the suspension-substitution aspects of the *Southwest Renewal-United Suspension, West Coast Renewal-United Suspension* and the *Reopened Additional California-Nevada Service* cases has changed as result of the proposed merger of Southwest and West Coast; that such factual changes, in the event of approval of the proposed merger will seriously affect the validity of various findings and conclusions set forth in the Examiner's Report in the *Southwest Renewal-United Suspension Case;*

that essential facts will not be available to consider the aforesaid issues of suspension and substitution contemporaneously with the issues of the *Southwest-West Coast Merger Case;* that consolidation of the aforementioned suspension-substitution issues into the *Southwest-West Coast Merger Case,* would materially enlarge the scope of that case and prevent expeditious disposition of the merger application; that United's various proposals will result in a more orderly disposition of the issues of the aforementioned proceedings;

Western Air Lines, Inc. (Western), having filed with the Board on May 2, 1950, an application, Docket No. 4447, requesting amendment of its certificate of public convenience and necessity for route No. 63 so as to extend said route beyond Seattle-Tacoma, Wash., to the terminal point Bellingham, Wash., and add certain intermediate points between Los Angeles, Calif., and Bellingham, Wash.;

Western Air Lines of the Pacific, Inc. (Pacific), having filed with the Board on May 2, 1950, an application, Docket No. 4448, requesting a certificate of public convenience and necessity authorizing it to engage in air transportation between Los Angeles, Calif., and Bellingham, Wash., via various intermediate points;

Western having filed with the Board on May 2, 1950, Docket No. 4449, an application, *inter alia,* under section 408 of the Act, requesting approval of the acquisition by Western of the controlling stock interest of Pacific;

Western having filed with the Board on May 2, 1950, a petition requesting, *inter alia,* that the Board consolidate the aforementioned applications of Western and Pacific with the aforementioned proceedings in Docket Nos. 3718, 3966, 4405, and 2019 *et el.;*

Western having represented in support of its petition, *inter alia,* that the proceedings, Docket Nos. 3718, 3966, 4405, and 2019 *et al.,* are all interrelated; that Western's application, Docket No. 4447, and Pacific's application, Docket No. 4448, were framed to enable the Board to determine whether the public interest might be better and more economically served if a feeder service in the Pacific coast area were operated either directly by a regional trunkline carrier or by a wholly owned subsidiary thereof; that consolidation of all of the aforementioned proceedings will make available to the Board all essential evidence including the cost of operating feeder service in the Pacific coast area (a) by Southwest and West Coast separately, (b) by Southwest alone, under the proposed merger of Southwest and West Coast, (c) by Western, and (d) by Western through a wholly-owned subsidiary, Pacific; that Western's application for approval of its acquisition of Pacific, Docket No. 4449, is directly related to the aforementioned applications of Western and Pacific, under section 401 of the Act; that consolidation of the aforementioned seven interrelated proceedings into one proceeding for a single hearing and decision will provide the Board with a complete and comprehensive record relating to the over-all public interest; that substantial savings in

time and effort with respect to disposition of said proceedings will result from consolidation thereof;

Southwest and West Coast having filed with the Board on May 10, 1950, a joint motion in opposition to the aforesaid motion of United and petition of Western requesting, *inter alia,* that the Board deny United's motion and Western's petition; that the record be closed in the *West Coast Renewal-United Suspension Case;* that the Board defer the suspension and substitution issues in both of the aforementioned renewal-suspension proceedings for decision with the *Southwest-West Coast Merger Case;* that said merger case be broadened to embrace an issue with respect to the effect of merger approval upon the various suspension and substitution issues; and that the merger case and the aforementioned suspension substitution issues be decided concurrently;

Western having filed with the Board a memorandum and supplemental memorandum in support of its petition herein; and the Post Office Department having filed with the Board a letter in support of said petition;

Southwest having filed with the Board a letter in opposition to Western's aforesaid supplemental memorandum;

The Board, upon consideration of the aforementioned applications, motions, petitions, and memoranda, finding:

1. That although the aforementioned *Southwest Renewal-United Suspension Case,* Docket No. 3718 *et al.,* the *West Coast Renewal-United Suspension Case,* Docket No. 3966 *et al.,* and the *Southwest-West Coast Merger*

Case, Docket No. 4405, are in certain respects interrelated to such an extent that it may prove advantageous and consistent with orderly procedure for the Board to decide the three cases simultaneously, United has not established that (a) severance of the renewal issues from Docket Nos. 3718 *et al.,* and 3966 *et al.,* and consolidation of such issues with Docket No. 4405; or (b) deferral of all further procedural steps in Docket No. 2019 *et al.,* and on the suspension-substitution issues in Docket Nos. 3718 *et al.,* and 3966 *et al.,* is required as a matter of law or that the benefits that might flow from such action, when weighed against the undesirable results that would stem therefrom, warrant such action as a matter of Board discretion;

2. That in view of matters such as the new one-carrier, one-plane service that might be possible between points on the routes of Southwest and West Coast should the aforementioned merger proposal be approved, the *Southwest Renewal-United Suspension Case,* Docket No. 3718 *et al.,* should be reopened, and the *West Coast Renewal-United Suspension Case,* Docket No. 3966 *et al.,* should be reconvened for further hearing in order that evidence may be adduced with respect to the effect, if any, of the aforementioned merger proposal upon the substitution-suspension issues in said proceedings; that since Southwest and West Coast will continue, until final disposition of their certificate renewal applications in Docket Nos. 3718 *et al.,* and 3966 *et al.,* to hold operating authority over their respective routes by virtue of the provisions of section

9(b) of the Administrative Procedure Act, any delay in the disposition of the renewal proceedings that may result from the action herein taken will not prejudice said carriers;

3. That consolidation of the *Reopened Additional California-Nevada Service Case,* Docket No. 2019 *et al.,* with Docket Nos. 3718 *et al.,* 3966 *et al.,* or 4405, would unduly expand the scope of the issues in each of said proceedings and unduly delay the disposition thereof; that deferral of said proceeding would unduly delay the disposition thereof;

4. That consolidation of Docket Nos. 4447, 4448, and 4449 with Docket Nos. 3718 *et al.,* and 3966 *et al.,* or Docket No. 4405 would unduly expand the issues in such proceedings, unduly delay the disposition thereof, and is not conducive to the proper dispatch of the Board's business;

5. That, with respect to all other relief sought, the various motions, petitions, and memoranda herein fail to set forth facts which would warrant the granting of such relief;

It Is Ordered:

1. That the *Southwest Renewal-United Suspension Case,* Docket No. 3718 *et al.,* be and hereby is reopened and the *West Coast Renewal-United Suspension Case,* Docket No. 3966 *et al.,* be and hereby is reconvened for further hearing for the purpose of permitting additional evidence to be adduced solely on the question of the effect,

if any, upon the substitution-suspension issues in said proceedings of the proposed merger of Southwest and West Coast;

2. That the aforesaid motions and petitions, except to the extent granted herein, be and hereby are denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

APPENDIX D.

E-4484

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: August 4, 1950

DOCKETS NOS. 4405, ET AL.
SOUTHWEST-WEST COAST
MERGER APPLICATION, ET AL.

Decided: July 26, 1950

Petitions of Western Air Lines, Inc. and United Air Lines, Inc. for reconsideration of Order Serial No. E-4292, dated June 6, 1950, denied.

Statment of Ryan, Acting Chairman, and Lee, Member, in support of denial of petitions.

This opinion involves our consideration of petitions by Western Air Lines, Inc. (Western), and United Air Lines, Inc. (United), for reconsideration of Order Serial No. E-4292, dated June 6, 1950. That order, which was adopted unanimously by the Board members who participated in such action, denied various requests made by Western and United with respect to procedure in the handling of seven proceedings relating to air service in the Pacific Coast area. The Board members participating in reconsideration have divided evenly on the action to be taken on the petitions for reconsideration, and the petitions have therefore failed for lack of a majority.

The original petition of Western requested consolidation for purposes of hearing and decision of these seven proceedings involving the renewal of temporary certificates of Southwest Airways

[2]

Company (Southwest) and West Coast Airlines, Inc. (West Coast), the proposed suspension of various points on the routes of United, Western and Frontier, the proposed merger of Southwest and West Coast, the application of Southwest and Bonanza for routes from Los Angeles to Phoenix, and applications of Western for authorization to provide services either in its own right or through a subsidiary (Western of Pacific) over the routes now served by Southwest and West Coast. The applications of Western and Western of Pacific were not filed until after hearing and issuance of the examiner's report in the Southwest Renewal-United Suspension Case and substantial completion of the hearing in the West Coast Renewal-United Suspension Case. Order Serial No. E-4292 reopened or reconvened hearing in both cases to take evidence only as to the effect of the proposed Southwest-West Coast merger upon the issues relating to suspension of United points.

In its original petition and supporting memoranda, Western principally argued that the proposed merger of Southwest and West Coast would create excessive competition for Western and United, that it could operate the Southwest-West Coast feeder routes at an annual saving to the Government of a substantial sum, and that the

Board should consider problems of air service on the Pacific Coast as a whole and not in several proceedings. In Order Serial No. E-4292, the Board found that the consolidation

[3]

of the applications of Western and Western of Pacific would unduly expand the scope of the issues in each of the other proceedings involved, would unduly delay the disposition thereof, and would not be conducive to the proper dispatch of the Board's business. Accordingly, the Board denied the petition.

In its petition for reconsideration of the Board's order and its reply to answers of West Coast and Southwest in opposition thereto, Western has reiterated the arguments of its original petition which we previously found insufficient to warrant the delay and disruption of existing proceedings which would result therefrom. In addition, Western has urged certain contentions not found in its original petition. In our judgment, however, Western has not now advanced any facts or contentions which warrant a change in the findings in said order, and hence the petition for reconsideration should be denied.

One of the major difficulties confronting Western in its request for consolidation is the fact that its own applications for authorization to serve the feeder routes now being operated by Southwest and West Coast were filed long after the proceedings on the renewal of the certificates of West Coast and Southwest for those routes and the suspension of various points in the areas now served by

United had been instituted and only after such proceedings reached the advanced procedural stages indicated above. This fact not only eliminated any legal grounds that Western might urge in support of consolidation of its application with those proceedings, but it also substantially diminished the weight of its arguments to the effect that the public interest requires consolidation.

[4]

In its petition for reconsideration, Western argued that the Board is required to grant the requested consolidation by the holding in *Ashbacker Radio v. Federal Communications Commission,* 326 U. S. 327 (1945). Consolidation is required only where refusal thereof would deny the applicant that hearing upon its application to which it is entitled under all the circumstances. No such right is being denied Western. It is clear that the principles of the *Ashbacker* case do not require consolidation of a route application with other route proceedings in which public hearings have been substantially completed, even though they are alleged to be mutually exclusive. Nor do the principles of this case require the consolidation of an application for routes and an application for approval of a merger, since these are not mutually exclusive, and inclusion of the route proceedings in the merger case would greatly enlarge the issues in that proceeding.

Western also argues that its applications involve the same type of service as is proposed by Southwest and West Coast and, therefore, fall within the language of the court in *Eastern Air Lines, Inc. v. Civil Aeronautics Board*

(78 F. 2d, 726, 1949). Here again it is clear that the *Eastern* case is not applicable where one of the applications concerned has not been seasonably filed.

Western further contends that considerations of public interest require the Board to grant consolidation in this instance. In support of this contention, Western cites findings in our previous

[5]

order as to the relationship between the renewal-suspension cases and the merger proceeding, the reopening of the renewal-suspension cases and receipt of evidence as to the effect, if any, of the merger upon the "suspension-substitution" issues in said proceedings, and that neither Southwest nor West Coast would be prejudiced by the delay that might be involved in such action.

It further contends that the public interest requires consideration of the Pacific Coast air transportation problem as a whole and of possible savings to the Government that it claims would follow if its applications were granted. None of these arguments meets the objections resulting from Western's long delay in filing its applications. Nor do they take account of the difference between the effect of the limited reopenings made by the Board in its prior order and of the sweeping scope of the proceeding which would result from the consolidations requested by Western. Although we did find in the prior order that there was a sufficient relationship between the renewal-suspension cases and the merger case to warrant reopening the former cases for a limited purpose, and that the delay caused by this

action was not prejudicial to Southwest or West Coast, such findings do not fit a situation in which we are requested to consolidate seven proceedings, all of which involve issues of a substantial nature and which can only create an unwieldy case and prolonged delays. Hence, after considering the matters of public interest

[6]

asserted by Western, we find that they are outweighed by the public interest in orderly conduct of the Board's business and in avoiding undue delay in disposition of the issues in the other proceedings. Furthermore, as an intervener, Western will have a full opportunity in the merger proceeding to introduce any relevant evidence on public interest aspects of the Southwest-West Coast merger proposal, including evidence as to the effect, if any, of the merger upon Western.

To meet the difficulties of delay and disruption of orderly procedure inherent in its proposal, Western, in its petition for reconsideration, has advanced various reasons in explanation and justification of its failure to file its route applications at an earlier date. Western argues that filing of its applications was done at a time and in a manner which in the light of historical developments was the earliest time when it was appropriate for Western to do so. This argument is based on the contention that it was not until the actual filing of merger plans between Southwest and West Coast that the full objective of their ambitions and its effect upon Western was revealed. As a part of this contention, Western alleges that for approxi-

mately a year, it has vigorously endeavored to achieve some Western-Southwest-West Coast merger, consolidation, or acquisition and that it would have been extremely unwise

[7]

for Western to have defeated any chances it might have had for successful completion of these negotiations by filing an application for the same points served by the companies involved. It may be noted that Southwest and West Coast deny that there was ever any serious negotiations between those companies and Western. However, even if the allegations of Western are given their full weight, it is apparent that they do not furnish a basis to change our previous determinations that the requested consolidation would cause undue delay and interfere with orderly procedure. Whatever the merits of Western's action or non-action from its own point of view, it is nevertheless clear that the carrier made a deliberate choice and must now abide by that choice. Western cannot now contend that the administrative clock should be set back in order to accommodate its late filing.

Western has also argued that Southwest and West Coast suppressed their merger plans during consideration of the renewal cases involving those carriers and that these plans were not smoked out until Western filed requests for subpoenas in the West Coast Case. It is argued that this constitutes a misleading circumstance which further explains why Western did not file its route applications at an earlier date. In a document filed on July 25,

1950, Western set forth various facts in support of its allegation based upon exhibits which have been submitted in the merger case. Even if there were any misrepresentation such as alleged, and we do not here pass on that point, it occurred long after the appropriate

[8]

time for Western to have filed its applications for authorization to serve Southwest and West Coast's routes in order to have them heard with the renewal proceedings.

Apart from this question of misrepresentation in the renewal proceeding, Western apparently assumes that during the pendency of negotiations between Southwest and West Coast, prior to the completion and filing of the merger agreement, Western was entitled to be advise of the status of such negotiations for the purpose of determining its course of action. It would seem obvious that no such right in Western exists.

In any event, we are not impressed with the atmosphere of conspiracy that Western seeks to create here. The possibility—or indeed the likelihood—of a proposal for merging the Southwest and West Coast systems has been obvious since the creation of these two carriers, and those familiar with the airline industry have long been aware of the possibility of such a development. The mere fact that Western may have been frustrated in its efforts to keep abreast of the merger negotiations between West Coast and Southwest does not mean that Western was thereby rendered powerless to protect its position. If Western feared the possibility of a merged feeder system

on the West Coast, and wished to combat it by a proposal for rendering the service itself, Western could and should have filed timely applications to compete with the renewal applications of West Coast and Southwest.

[9]

Without passing upon the various problems that must be explored in the merger case, and the additional impact that a merged system may have on Western's position, Western cannot escape the fact that the separate routes of West Coast and Southwest were in existence for approximately three years prior to the start of the renewal proceedings. When the Board proposed to renew these routes for an additional five-year period, not only did Western fail to file competing applications for the routes, but it did not for some time even oppose the proposed renewal of the routes.[1] It is thus apparent that Western has, for a considerable time, and to a considerable extent, slept on its opportunities to seek authority to supplant the West Coast and Southwest systems, and it is clear that its present concern is a product of its own course of conduct rather than any inequities in the Board's procedures.

[10]

United in its motion filed April 27, 1950, requested (1) severance from the Southwest and West Coast Renewal

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[1]It is of interest that Western did not even appear at the Prehearing Conferences in the renewal cases of either Southwest or West Coast. In the Southwest renewal case it was not until February 10, 1950,—after the hearing—that Western addressed a letter to the Examiner announcing Western's opposition to the renewal of Southwest's certificate. This late awakening or change of heart, as the case may be, is particularly noteworthy since the renewal cases involved the basic route structure that Western wishes to supplant by its own tardy route applications. The merger agreement, while providing for a single company to operate both feeder route systems, does not and cannot provide for any additional route authorizations (other than the possibility of single plane service rather than connecting plane service at Medford).

Cases of the issues of renewal of the certificates of Southwest and West Coast (leaving therein only the issues of suspension of United at certain of its points and substitution of Southwest and West Coast); (2) consolidation of the severed portions with the application of Southwest and West Coast for merger, for hearing and decision; (3) deferment of all further procedural steps with respect to the remainder of the Southwest and West Coast Renewal Cases, and deferment of the reopened Additional California-Nevada Service Case, until after final decision in the merger case and, in the event the merger is approved, until after operating experience has been obtained under the merger. This motion was denied by Order Serial No. E-4292 on the basis of the findings set forth therein.

In its petition for reconsideration of Order Serial No. E-4292 United argues for the first time that such order is erroneous and invalid as a matter of law in that it denies United the full and fair hearing required by *Morgan v. U. S.*, 304 U. S. 1. United contends that the Board's order does not give it a reasonable

[11]

opportunity to know and meet the present claims of the opposing parties in the renewal-suspension cases; that the Board has erroneously shifted upon United the burden of trying the effects of the merger upon the suspension-substitution issues in such cases; and that the Board must now come forward and show what changes, in its opinion, are required in its prior show cause orders initiating these cases if the merger is approved. We believe that the procedure provided in the Board's prior order fully meets the rights of United to full and fair hearing upon the suspension-substitution issues in the renewal-suspension cases in the light of the proposed Southwest-West Coast

merger. In that order we took cognizance of the possible effect of the merger proceeding on the suspension issues in the two renewal cases and ordered the reopening of Docket No. 3718 *et al.* and the reconvening of the proceeding in Docket No. 3966 for further hearing in order that evidence may be adduced with respect to the effect, if any, of the merger proposal upon such issues.

We have further established a schedule of hearings under which hearing before the Examiner in the merger case will be completed prior to the reopened and reconvened hearings in the renewal-suspension cases. United thus has full opportunity to present in the records of the renewal-suspension cases all relevant evidence as to the effects of the merger on the suspension-substitution issues. Moreover, it will have full opportunity to cross-examine on any evidence presented by Government counsel as to the effect of the proposed merger on the issues affecting United.

[12]

The carrier cannot insist that the orders instituting the renewal-suspension cases be amended and reissued and the proceedings in effect start over again because of the intervening fact of the proposed merger. All it is fairly entitled to is the right to explore in the record of those cases the effect of the merger, if any, upon the suspension-substitution issues. Recognition of an argument that the order instituting the proceedings must be amended to include subsequent intervening facts would make it impossible to complete such proceeding. Finally, the Board was not required to issue show-cause orders to initiate the renewal-suspension cases. It could have utilized an investigatory type of order. The fact that the Board gave United the benefit of its preliminary thinking in the form of show-

cause orders does not impose any greater burden on the Board or give United any greater rights that it would have otherwise had.

/s/ Oswald Ryan
/s/ Josh Lee

[1]

Statement of Member Jones
In Opposition to the Order,
Member Adams Concurring

The Board did on June 6, 1950, deny various motions and petitions of United Air Lines, Inc. (United) and Western Airlines, Inc. (Western), requesting that various related cases involving air transportation on the West Coast be consolidated into one proceeding.

United filed with the Board exceptions to the order denying its motion and also filed a petition for reconsideration of the order. Western likewise filed a petition for reconsideration.

These petitions for reconsideration duly came before the Board, together with the answers and replies of West Coast and Southwest in opposition thereto. The four members of the Board were equally divided on the question as to whether or not said petitions should be granted, and the Acting Chairman instructed the Secretary to prepare an order denying said petitions for want of a majority.

It must be presumed that the two members who voted to deny the petitions had proper grounds for doing so, to-wit: that (a) no new matters were presented by the petitioners; and (b) no legal question was raised, of sufficient importance to justify a reconsideration.

I cannot agree with the determination arrived at by my two colleagues. New matters of very large importance were called to the Board's attention by the petitioners, and serious questions of law were presented.

For example, there was called to the Board's attention the fact that West Coast and Southwest had actually signed a merger agreement prior to the hearing on the renewal of West Coast's certificate. I quote from United's pleadings:

[2]

"On November 6, 1949, West Coast's and Southwest's officials signed an agreement whereby the parties agreed to a merger plan between the two companies which had been in negotiation from prior to the time of the above testimony (Ex. S-14). On December 2, 1949, West Coast's Board of Directors approved the reorganization plan whereby West Coast would be merged into Southwest upon the terms set forth in the proposed merger agreement (Exs. S-12, S-14, S-15). *Yet on March 28, 1950,* West Coast's Executive Vice President testified in the *West Coast Renewal-United Suspension Case* that West Coast's Board of Directors had merely authorized West Coast's President to investigate the possibility of a merger and 'that is the extent of it so far. He has not reported back to the Board of Directors' (Rec. 299-300, Docket No. 3966, et al.)."[1]

United also called to the attention of the Board the conduct of counsel for Southwest at the same hearing, which

[1]Reply of United Air Lines, Inc., to the Answer of West Coast Airlines and Southwest Airways to United's and Western's Petitions for Reconsideration, July 20, 1950; page 5.

conduct, to put it euphemistically, was evasive and misleading, and, from the record, an apparent effort to conceal that a merger agreement between Southwest and West Coast did in fact exist.[2]

Western raised a serious question of law in urging, with impressive force, that judicial precedents require the Board to consolidate Western's applications for the West Coast feeder routes into the pending renewal proceedings for concurrent decision. The legal issue thus presented is an important one, and in itself should require reversal of the Board's previous order of denial.[3]

Numerous other instances of new matters called to the attention of the Board could be cited. The above should suffice.

[3]

Under these circumstances the Board was called upon to make a determination whether to review these matters, together with the other matters discussed *infra,* in one proceeding in a logical effort to, with the broadest possible freedom, attempt to determine the overall air transport needs of this very important area at one time, with all the related facts and issues before it. The alternative was to ignore basic and important issues directly affecting the welfare of the entire West Coast and the air transport system best fitted to serve this area, and determine the issues on a case-by-case basis in what would amount to a succession of "keyhole" approaches limited as to issues and scope of possible action.

The pending route cases include the *Southwest Renewal-United Suspension Case,* Docket No. 3718, *et al.,* which

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[2]*Ibid.,* page 6.

[3]Petition of Western Air Lines, Inc., for Reconsideration, June 26, 1950; page 23 *et seq.*

involves the future of Southwest and the feeder service pattern in the area in which it operates; the *West Coast-United Suspension Case,* Docket No. 3966, *et al.,* which presents the same issues with respect to West Coast and its operating territory; and the *Reopened Additional California-Nevada Service Case,* Docket No. 2019, *et al.,* concerning the air service pattern in the area between Los Angeles and San Diego, on the one hand, and Phoenix on the other. These cases have been pending for some time, hearings have been held, and the Examiner's report has been issued in the Southwest Renewal Case.

These issues alone should justify the consolidation requested. However, they have been greatly broadened as a result of the filing on April 10, 1950, of a request for the approval of the proposed merger between Southwest and West Coast above mentioned. As stated before, West Coast and Southwest apparently sought to conceal the proposed merger from the Board until

[4]

after the prospective renewal cases had been decided, and it was only brought to the Board's attention as a result of a threat of subpoena.

A merger of so-called feeder lines of the magnitude revealed by the merger agreements and the record raises very important matters of policy directly affecting the air transport system on the West Coast and indirectly affecting the entire domestic air transport system. It directly poses the question asked by me in the *Monarch-Arizona Merger Case,*[4] which question remains unanswered by the Board, namely:

"What *is* the feederline experiment *now* being con-

[4]Docket No. 3977, *et al.,* decided April 10, 1950.

ducted by the Board—is it the establishment of a secondary nationwide system to be perpetually subsidized by the Government to the extent of many millions of dollars per year, or is it controlled experimentation with a number of supplemental local systems which give some promise of achieving self-sufficiency?"

This important question might well be answered by action taken by the Board in a consolidated proceeding, because this merger proposal, together with the other matters in issue, raises the possibility of a single, secondary, short-haul "feeder" system extending the length of the West Coast and penetrating the Southwest as far as Phoenix, Arizona. It, together with the huge feeder system created by the Monarch-Challenger-Arizona merger, may well serve to establish a secondary subsidized feeder system embracing the entire western United States. Surely, the public and other interested airlines have the right to have this matter considered in connection with the *Southwest Renewal-United Suspension Case* in which the Board has tentatively decided to renew Southwest's certificate and attempt to give portions of United's system to it; and the *West Coast-United Suspension Case* which

[5]

likewise proposes to renew West Coast and again to give certain of United's system to it; and the other related matters sought to be consolidated by the Petitioners.

Surely, if the Board does intend to create a secondary nationwide system serving smaller communities and perpetually subsidized by the government, the taxpayer is entitled to be apprised of its intention. It should not creep upon the matter by stealth and create such a system piece-

meal. If the traveling public and shippers in the smaller cities are to be furnished by the government with a kind of social service whereby transportation is to be furnished to the citizens dwelling in the smaller cities cheaper than its cost, then the taxpayer should be entitled through Congress to know what the cost will be and whether *all* the people want it.

There is also pending a Board investigation into the route structure of Western, Docket No. 2911, which was launched by the Board in February, 1949, because it appeared to be an area where "remedial action designed to correct uneconomic situations is desirable."[5] Although the Western investigation has not been actually processed to date, the Board has informed the public that "it will be pushed forward as rapidly as staff permits."[6]

Thus, it seems to me that the Board has been presented by the West Coast carriers with a perfect opportunity to proceed with the final determination of the service required by the public interest and at the same time to complete the investigation which it inaugurated.

[6]

It seems particularly indefensible to refuse to hear the applications of Western for the operation of the West Coast feeder routes before deciding the applications of West Coast and Southwest for certificate renewal and approval of the merger proposal. This amounts in practical effect to a refusal to hear issues which offer the prospect of saving the taxpayer at least $750,000 annually, even though it would involve no disruption of present service or substantial prejudice to any carrier. If the

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[5]*Statement of Policy* from Economic Program for 1949, p. 14.
[6]*Annual Report of Civil Aeronautics Board,* 1949, p. 6.

Southwest and West Coast certificates are renewed, and their proposed merger is approved, then it is perfectly obvious that Western's proposal will, as a practical matter, have been foreclosed. In addition to the important public interest elements involved, such a procedure poses serious legal questions which should be carefully considered, rather than disposed of in so cavalier a manner.

Under all the circumstances, I feel that both the public interest and the interests of all the parties demand that the Board's previous denial of the petitions of United and Western should be reconsidered and reversed and that all of the pending proceedings involving West Coast service, including the Western investigation, should be consolidated, in order that the Board might hear all of the facts and all of the issues before deciding the future of the West Coast air transport system.

Member Adams joins me in this Statement.

/s/ Harold A. Jones
/s/ Russell B. Adams

Orders
Serial Number E-4484

[1]

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 26th day of July, 1950.

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In the matter of the :
Southwest-West Coast :
Merger Application :

SOUTHWEST RENEWAL-UNITED SUSPENSION CASE		
WEST COAST RENEWAL-UNITED SUSPENSION CASE		
REOPENED ADDITIONAL CALIFORNIA-NEVADA SERVICE CASE		
WESTERN AIR LINES, INC. Application for additional intermediate points in the states of California, Oregon and Washington on its Route 63,	Docket Nos.	4405 3718 *et al.* 3966 *et al.* 2019 *et al.* 4447
WESTERN AIR LINES OF THE PACIFIC, INC. Application for a certificate of public convenience and necessity for a route between Los Angeles, California and Bellingham, Washington by way of various intermediate points, and		4448 4449
WESTERN AIR LINES, INC. Application for approval of the acquisition of complete stock ownership of Western Air Lines of the Pacific, Inc.		

ORDER.

The Board having by Order Serial No. E-4292, dated June 6, 1950, acted upon various motions and petitions of United Air Lines, Inc. (United), Western Air Lines, Inc. (Western), and Southwest Airways Company (Southwest), requesting, *inter alia,* certain severances, consolidations, and deferrals;

United having filed with the Board on June 22, 1950, exceptions to, and a petition for reconsideration of Order Serial No. E-4292;

Western having also filed with the Board on June 26, 1950, a petition for reconsideration of the aforementioned order;

West Coast Airlines, Inc. (West Coast) and Southwest Airways Company (Southwest), having filed with the Board on July 14, 1950, a joint answer to the aforementioned petitions for reconsideration; and United and Western having filed replies to the aforesaid answer;

[2]

The Board having duly considered the aforementioned petitions, answer, and replies, and the four members of the Board being equally divided on the question whether such petitions should be granted, the petitions fail for want of a majority;

IT IS THEREFORE ORDERED, That the aforementioned petitions for reconsideration filed by United and Western be and hereby are denied.

By the Civil Aeronautics Board:

/s/ Fred A. Toombs
Fred A. Toombs
Acting Secretary

(SEAL)